

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1023 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

FEROZKHAN G PATHAN

Versus

STATE OF GUJRAT

Appearance:

MS BANNABEN DATTA with MR ANIL S DAVE for Petitioner
MR SP DAVE, Ld. APP for Respondent No. 1

CORAM : MR.JUSTICE M.S.PARIKH

Date of decision: 21/04/98

ORAL JUDGEMENT

1. One Bhavarkhan Variskhan, residing at Muslim Society, Dani Limda, Ahmedabad had one daughter Firozbanu aged about 21 years amongst his ten children. She was the eldest daughter out of his second wed-lock. She was got married with Firozkhan Georgekhan Pathan, appellant herein (Accused no. 1 in Sessions Case No. 56/1992) around two years before the date of incident,

namely 17-18/8/1991. Firozkhan will hereafter be described as 'the accused'. After the marriage of Firozbanu with him Firozbanu was residing with him. Her father-in-law, mother-in-law, her husband's elder brother and his wife also used to reside under the same roof. She became pregnant and since the second month of her pregnancy she was being tortured by the accused and his brother's wife Gulbanu. They used to beat her. This was the complaint she made when she went on the occasion of delivery, to her parental house. She delivered a male child, who died after one month. Around 3 months thereafter she was sent back to her matrimonial home. After her stay there for about 2 months she returned to her parents' house complaining about the accused telling her frequently to act according to his brother's wife's say, failing which her hair and nose would be cut off. She was therefore, staying at her parents' place. On 16/8/1991 her mother-in-law and her husband's brother's wife had been to take her. Accordingly she was sent once again to her husband's place. Around 11.30 to 12.00 O'clock at night on 17/8/1991 she set her ablaze with the result that she was removed to Shardaben Hospital. The accused had gone to inform her father about the burn injuries sustained by her. Accordingly the parents of Firozbanu had been to Shardaben Hospital finding there their daughter having sustained burn injuries right from throat to leg. However, she was fully conscious and when she was asked about what happened, she informed her father that after having been taken to her matrimonial home, her husband had quarrelled with her and during the night of 17/8/1991 she was again threatened to be killed by pressing her throat if she did not act according to what her husband's brother's wife would say. She informed her father that on account of such quarrel she had poured kerosene on herself and sustained the burn injuries. She also told that her husband had threatened to give her divorce. Her father Bhavarkhan Variskhan, therefore, had given complaint with regard to the incident in question.

P.S.I. Mr. Maldev Viram Parmar received information from P.S.O. Shaher Kotda Police Station at around 1.10 at mid-night of 17/8/1991 that Firozbanu, wife of Firozkhan the accused herein, had sustained burn injuries. He, therefore, went to Shardaben Hospital and made arrangement for recording of dying declaration of deceased Firozbanu. Under such circumstances at the complaint of the father of Firozbanu the matter came to be investigated. After investigation was over, the charge-sheet was submitted and the learned Metropolitan Magistrate, Court No.3, Ahmedabad committed the case for

trial before the Sessions Court. The Ld. Addl. Sessions Judge, after the charge was framed and after the trial was held, recorded conviction and sentence as per his impugned judgment dated 16/10/1995 in Sessions Case No. 56 of 1992 and directed the accused to suffer rigorous imprisonment (RI) for two years and to pay fine of Rs.1,000/- in default to suffer RI for one month for the offence punishable u/S. 498A of the Indian Penal Code (for short 'IPC') and RI for a period of four years and to pay fine of Rs.2,000/- in default to suffer RI for one month for the offence punishable u/S. 306 of the IPC. It is this judgment which has been subjected to challenge before this Court in this appeal.

2. It might be noted that accused no. 2 - Gulbanu Asrafkhan was acquitted of the offences charged against her.

3. The defence of the accused was one of denial. Before the submissions made on behalf of the accused in this appeal are taken up for consideration, a brief resume of the evidence adduced by the prosecution may be made. The prosecution has examined following witnesses :-

- i. PW 1 Navnitbhai Sundarbhai Parmar, Executive Magistrate, who recorded the dying declaration of Firozbanu, who had sustained burns during the course of incident in question, exh. 14
- ii. PW 2 Bhavarkhan Vasirkhan Pathan, the complainant exh. 17, who happens to be the father of deceased Firozbanu. He has testified to the facts of the prosecution case as have been noted in the opening part of this judgment.
- iii. PW 3 Badshahbibi Bhavarkhan, mother of deceased Firozbanu, who has also testified to the facts of the prosecution case, which might be referred to from the opening part of this judgment.
- iv. PW 4 Hanifabibi Badshah, exh. 20 is the panch witness with regard to Inquest panchnama exh. 21.
- v. PW 7 Dr. Bijan Vinaykant Parikh, exh. 28 had an occasion of attending deceased Firozbanu after she was admitted in Shardaben Hospital. This witness had deposed to the facts with regard to the treatment given to deceased Firozbanu when and after she was brought to Shardaben Hospital. He has also deposed to the injuries noticed by him and the case papers of the hospital. He has in terms stated that he had occasion to opine that Firozbanu was conscious at a particular point of time (when her dying declaration was

recorded as also when her statement was recorded).

- vi. PW 6 Dr. Gaurang Govindbhai Kothari has been examined with respect to post mortem report.
- vii. PW 7 Ramanbhai Govabhai exh. 24 has been examined in respect of scene of offence panchnama exh. 25.
- viii. PW 8 Maldev Viram Parmar exh. 30 happened to be the P.S.I. of Shaher Kotda Police Station at the relevant point of time and he has been examined as the I.O. in respect of the incident in question.
- ix. PW 9 Devabhai Chehabhai Bharvad exh. 31 has been examined as another I.O.

4. Out of the important documents which have been placed on record the complaint appears at exh. 18, the dying declaration appears at exh. 16, the panchnama with regard to scene of offence appears at exh. 25, the inquest panchnama appears at exh. 21, the treatment papers of deceased Firozbanu appear at exh. 29, the P.M. Report appears at exh. 23 and the report from the F.S.L. appears at exh. 34. The learned advocate appearing for the accused read the evidence placed on record by the prosecution also before this Court. She, however, concentrated upon the evidence of dying declaration and the medical witnesses. According to her submission, deceased Firozbanu was not conscious and not in a fit condition so as to give her dying declaration or statement. For that purpose she referred to the extent of burn injuries which had been noted in the medical evidence. It would, therefore, be appropriate to go through the medical evidence in the first instance.

5. PW 7 Dr. Bijan Vinaykant Parikh exh. 28 happened to be resident medical officer at Shardaben Hospital at the relevant point of time. At about 1.00 O'clock at mid-night Firozbanu, wife of Firozkhan, the accused, was brought in the burns ward. She herself informed that she had attempted to commit suicide by setting her own self ablaze by pouring kerosene on herself and lighting the match stick. He had examined her and found following burn injuries :-

- i. 6% burn injuries on the head and neck
- ii. 9% burn injuries on the right hand
- iii. 9% burn injuries on the left hand
- iv. 18% burn injuries on the chest and abdomen
- v. 1% burn injuries on the private part
- vi. 16% burn injuries on the right leg
- vii. 15% burn injuries on the left leg.

There were burn injuries on account of breathing at the time of incident and such injuries could be noticed in the inner portion of the nose and the face. In this fashion the patient Firozbanu had sustained 92% burn injuries. The witness has then categorically testified that when Firozbanu was admitted to the hospital, she was conscious. The treatment which was prescribed for her was noted in the case papers, which were brought by the witness. He has in terms testified that the sedatives and pain killers were being given only after the statement of the injured was recorded by the police as well as Executive Magistrate. Firozbanu was not accordingly administered the sedatives and pain killers. According to this witness she died at about 7.30 O'clock in the morning on 18/8/1991. According to the notes made by him and according to his evidence she was conscious upto 3.00 O'clock at night on 18/8/1991. He then proved the injury certificate given by him and accordingly placed on record at exh. 29. He has then referred to exh. 15 containing the endorsement with regard to patient being conscious, having been made by him and initialled by him. He has then referred to the dying declaration, which also contains his endorsement to the effect that the patient was conscious. He has identified the endorsement and his initial on the dying declaration exh. 16. On going through the cross-examination of this witness it might be noticed that not a single question was asked with regard to mental condition of the patient. The cross-examination has been directed with regard to the notes made in the case papers, more particularly with regard to information which Firozbanu had given to the effect that she had attempted to commit suicide by pouring kerosene on herself and lighting match stick. It, therefore, clearly appears that there is nothing which could be brought out from this witness that would indicate that Firozbanu was either not conscious or was not in such a mental condition as would disable her from giving her statement. In that view of the matter, the medical evidence although speaking about 92% burns sustained by the deceased Firozbanu does not support the defence that Firozbanu was not in such a mental state as would enable her to give her statement either before the police or before the Executive Magistrate.

6. Reference was then made to the evidence of Dr. Gaurang G. Kothari, PW 5 exh. 22. He had an occasion to perform post mortem of the dead body of the deceased Firozbanu. He has referred to the P.M. Report appearing at exh. 23. Learned advocate appearing for the accused referred to column no. 19 indicating that brain was found congested and oedematous. However, with regard to

this finding of the P.M. Report no question has been asked to Dr. Gaurang Kothari so as to canvass that at the time when the statement of deceased Firozbanu was recorded and at the time when her dying declaration was recorded, her brain was so adversely affected as to disable her to give any statement. Thus there is no part of evidence in the oral testimony of either of the medical witnesses which would go to indicate that there was any brain injury on account of burns. The burns on the head and throat were to the extent of 6%. Under such circumstances, when Dr. Bijan Parikh exh. 28 in terms deposed that Firozbanu was conscious atleast upto 3.00 O'clock at midnight between 17/8/1991 and 18/8/1991, there is no reason to doubt his version. The Ld. Addl. Sessions Judge has given cogent reasons for accepting the evidence of both the medical witnesses and the documents referred to by them.

7. Under the aforesaid circumstances the Ld. Addl. Sessions Judge has for the reasons recorded by him and upon appreciation of the whole of the prosecution evidence including the dying declaration and the evidence of the Executive Magistrate rightly come to the conclusion that the prosecution succeeded in establishing the prosecution case with regard to the offences charged against the accused persons. Firozbanu's parents have in terms deposed to the facts with regard to the cruel treatment which Firozbanu used to receive at the hands of her husband (accused). The dying declaration does contain some facts about the immediate acts of cruelty which ultimately led Firozbanu to commit suicide. The detailed facts appearing in the statement of Firozbanu before the I.O. also reveal the facts with regard to how she was ill treated at her matrimonial home. Hence, in the facts of the case, the prosecution evidence particularly one contained in the oral testimony of Dr. Bijan Parikh can hardly be doubted so as to discard the dying declaration of Firozbanu. It might be noted that the dying declaration has been recorded in the words spoken by Firozbanu. The same has been dealt with elaborately by the Ld. Addl. Sessions Judge. The learned advocate appearing for the accused was justified in not stretching much the minor discrepancies with regard to the past history narrated by the complainant and his wife.

8. In view of what is stated above, the submissions made on behalf of the accused in this appeal dealing with the medical evidence as aforesaid cannot be accepted.

9. I have also heard the learned advocate appearing

for the accused on the question of sentence. This is not a case where any indulgence can be shown in respect of sentence. Hence, following order is passed :-

This appeal is dismissed.

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** PER ** cr.a102395j.